

No. 86-397

IN THE SUPREME COURT  
OF THE STATE OF MONTANA

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IN RE THE MATTER OF THE ACTIVITIES                    )  
OF THE DEPARTMENT OF NATURAL RESOURCES        )  
AND CONSERVATION    )

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**FIRST AMENDED PETITION  
TO REVISE WATER RIGHT CLAIM EXAMINATION RULES**

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**FIRST AMENDED PETITION TO REVISE  
WATER RIGHT CLAIM EXAMINATION RULES**

On behalf of the Montana Water Court, the chief water judge respectfully submits the attached Water Right Claim Examination Rules to the Montana Supreme Court for its consideration. The attached rules are proposed amendments to the Water Right Claim Examination Rules which were originally issued by this Court following its decision in *Matter of Department of Natural Resources and Conservation* (1987), 226 Mont. 214, 740 P.2d 1096 and later revised on January 15, 1991 (“1991 Rules”). The 1991 Rules are applicable to the water right claim examination duties of the Department of Natural Resources and Conservation (DNRC) and to the water adjudication duties of the Montana Water Court.

**PROCEDURAL HISTORY**

On December 30, 2004, the Water Court filed its Petition to Revise the Water Right Claims Examination Rules (“2004 Petition”). The Water Court proposed a global revision of the 1991 Rules and a change in the title of the rules to “Water Right Adjudication Rules.”

The 2004 Petition was the subject of discussion during a Supreme Court public meeting on August 31, 2005, guided by an August 2, 2005 Memorandum authored by Justice Brian Morris. Justice Morris recommended the Court adopt the proposed revisions to Rules 1.I and 1.III through 6.XV, but not adopt the proposed rules applicable to the Water Court’s practice and procedures. Following a general

discussion by members of the Court and comments offered by the individuals attending the meeting, the Court deferred adoption of the proposed rules until the individuals present at the public meeting, representing the various agencies involved, could collaborate on further revisions.

That collaboration has taken place. The Water Court undertook the initial administrative task to separate the proposed rules into two parts, and to renumber, reformat and insert titles and subtitles into the proposed rules so that they would more closely resemble other court rules. Drafts of the resulting products were then separately posted on the Water Court website. Notice of the postings was provided by e-mail to the individuals who attended the August 31, 2004 public meeting and to others who have expressed interest in the proposed rules. Meetings were scheduled and held, and revisions were made. Both sets of proposed rules moved forward on similar, but partly separate collaborative paths.

Once the parties appeared to be in agreement with the substantive revisions to the rules applicable to the DNRC, the amendatory material inserted earlier into the proposed rules to highlight proposed revisions (underlining, strikethroughs, strategic bolding and capitalizations) was deleted and the product was again circulated and posted for final review with a final comment date of March 3, 2006. As no adverse comments or requests for additional time were received, the Water Court believes the

attached rules, except for proposed Rule 27(h)(5), are acceptable to the individuals who attended the Court's August 31, 2005 public meeting.

## **PROPOSAL**

The proposed revisions contained in this First Amended Petition are only applicable to the rules currently used by the DNRC in its examination of water right claims. The Water Court proposes that these rules retain the title of Water Right Claim Examination Rules (sometimes referred to as "W.R.C.E.R."). Proposed revisions to the rules applicable to the Water Court's practice and procedures will be filed at a later date and will be attached to a Second Amended Petition. We will propose that the title to the rules applicable to the Water Court be denominated as "Water Right Adjudication Rules."

With respect to proposed Rule 27, counsel for the Montana Department of Fish, Wildlife & Parks (DFWP) advised the Water Court early in the rule drafting process that it opposed the adoption of proposed Rule 27(h)(5). This proposed rule states as follows:

**RULE 27(h). Summary report.** In the summary report to the water court, the department shall provide on each abstract the following data and facts concerning the purpose of a right:

. . . .

(5) on wildlife, recreation, and fish and wildlife claims, other than claims filed by the Montana Department of Fish, Wildlife and Parks on Murphy Right streams as identified under section 85-801, R.C.M. 1947 (1969), a remark will be added to the water right abstract.

Example:

THE WATER COURT WILL HOLD A HEARING ON THIS CLAIM TO DETERMINE ITS VALIDITY AS REQUIRED BY *In Re Adjudication of Existing Water Rights*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396.

Proposed Rule 27(h)(5), W.R.C.E.R., is virtually identical to proposed Rule 5.II(8)(e) submitted to this Court in the Water Court's 2004 Petition. The Water Court submitted proposed Rule 5.II(8)(e) in 2004 and now submits proposed Rule 27(h)(5), for the same reason: To comply with the "clear instructions" provided by this Court to the Water Court in the "*Bean Lake III*" decision. *In Re Adjudication of Existing Water Rights*, 2002 MT 216, ¶ 41, 311 Mont. 327, ¶ 41, 55 P.3d 396 ¶ 41. In that decision this Court stated:

In adjudicating individual claims for pre-1973 recreation, fish and wildlife, the Water Court will have to determine the validity of each claim, and as to those claims it finds valid, it will have to assign a priority date.

*Bean Lake III*, ¶ 31.

Accordingly, the Water Court is instructed to identify, review and hold hearings in a manner similar to *Adjudication of Water Rights of Yellowstone River* (1992), 253 Mont. 167, 832 P.2d 1210, on all pre-1973 recreation, fish and wildlife claims, both diversionary and non-diversionary, and determine the validity of such claims under the holding herein.

*Bean Lake III*, ¶ 41.

To comply with the *Bean Lake III* instructions, the Water Court has proposed

Rule 27(h)(5) and the issue remark set forth therein. If such an issue remark is placed on each recreation, fish and wildlife claim and the remark is not resolved through the objection process, then the Water Court is required by § 85-2-247 and § 85-2-248, MCA, to resolve the issues raised by the remark. By doing so, the Water Court will thus comply with the Court's *Bean Lake III* instructions.

The DFWP expressed its objection to proposed Rule 5.II(8)(e) in its May 31, 2005 Comments, Suggested Amendments, and Objections to the Water Court's Revised Adjudication Rules on file with this Court. The DFWP has advised the Water Court that the reincarnation of proposed Rule 5.II(8)(e) as proposed Rule 27(h)(5) does not resolve the objections and concerns that DFWP had in 2005 on this issue.

A CD containing an electronic copy of this Petition and the attached rules in Word format is included as a final attachment to the original of this Petition. An identical version of the attached rules, again in Word, is posted on the Water Court website at [montanacourts.org/water](http://montanacourts.org/water) under Proposed Rules. The exhibits might be included on the website as PDF files.

## **CONCLUSION**

The Water Court recommends that this Court adopt the proposed Water Right Claim Examination Rules attached hereto. If adopted, these attached rules would modify the 1991 Rules as follows:



Rule 1.I(1) is DELETED from the 1991 Rules. The deleted text has been revised and incorporated into Rule 1(a), W.R.C.E.R.

Rule 1.I(2) is AMENDED to remove the references to the DNRC and to remove the text associated with the DNRC references. The removed text and references have been revised and incorporated into Rule 1(b), W.R.C.E.R.

Rule 1.I(4) is DELETED from the 1991 Rules. The deleted text has been revised and incorporated into Rule 1(b), W.R.C.E.R.

Rules 1.III through 6.XVI and the Chapter headings of 1 through 6 are DELETED from the 1991 Rules. The deleted rules have been revised and incorporated into Rules 2 through 46, W.R.C.E.R. The numerical sequence and the subject matter description of the deleted Chapter headings have been incorporated into the W.R.C.E.R. The text reference to “Chapter” has not been so incorporated.

The attached title page, the table of contents, and the exhibits of the attached Water Right Claim Examination Rules reflect the proposed rules as submitted. Any modifications made by the Court may require modifications to the page numbers of the table of contents.

If the Court adopts the attached rules at a date earlier from the adoption of the proposed Water Right Adjudication Rules, which we hope will be filed in the near future, then the Court will need to include a provision in its Order that Rule 1.I(3) and

Rule 1.II of the 1991 Rules (pertaining to Water Court procedure rules) are to remain in effect until further Order of this Court.

Respectfully submitted this 10 day of March, 2006.

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C. Bruce Loble  
Chief Water Judge

### **CERTIFICATE OF COMPLIANCE**

I certify that this First Amended Petition to Revise Water Right Claim Examination Rules is in compliance with Rule 27 of the Montana Rules of Appellate Procedure, as follows:

1. The Petition is double spaced and is printed with a proportionately spaced font of 14 point typeface;
2. The document contains 1,422 words, excluding certificate of service, certificate of compliance, tables, and appendices.

DATED this 10 day of March, 2006.

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C. Bruce Loble  
Chief Water Judge

## **CERTIFICATE OF SERVICE**

I, C. Bruce Loble, Chief Water Judge of the Montana Water Court, hereby certify that a true and correct copy of this First Amended Petition to Revise Water Right Claim Examination Rules and the attached proposed Water Right Claim Examination Rules were duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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In addition, this First Amended Petition and the attached rules have been electronically transmitted to the State Law Library for posting on the Water Court website. Notice of the posting has been provided by e-mail or U. S. Mail to members of the Water Adjudication Advisory Committee, Environmental Quality Council staff, water user groups, and other persons known to be interested in the proposed rules.

DATED this     day of March, 2006.

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C. Bruce Loble  
Chief Water Judge